No. 90-5721

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PERVIS TYRONE PAYNE,

PETITIONER,

v.

STATE OF TENNESSEE,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION *AMICUS CURIAE* IN SUPPORT OF THE STATE OF TENNESSEE

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BRIEF OF *AMICUS CURIAE* THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS OFFICE IN SUPPORT OF THE STATE OF TENNESSEE

Amicus curiae, the Appellate Committee of the California District Attorneys Association, and Ira Reiner, District Attorney of Los Angeles County, are filing this brief accompanied by the written consent of all parties pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States.

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INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter - which raises the issue of the admissibility of victim impact statements at capital proceedings - the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case shall likely have substantial impact upon the administration of

criminal justice throughout California. It is for this reason that the Committee seeks leave to file the attached *amicus curiae* brief herein.

Respectfully submitted
on behalf of the

California District Attorneys
Association, and the District Attorney
of Los Angeles County

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SUMMARY OF ARGUMENT

Amicus files the instant brief in order to urge this Court to overrule its prior decisions in *Booth v. Maryland*, 482 U.S. 496 (1987) and, as a secondary matter, in *South Carolina v. Gathers*, 490 U.S. 805 (1989). Since the split votes on those cases suggest that a majority of the Court may believe that *Booth* was incorrectly decided, Section I of the brief focusses upon the reasons that stare decisis should ***not prevent*** the Court from overturning that case. Section II is concerned with the substantive reasons that *Booth* was incorrectly decided, but is also intended to show that *Booth* "poses a direct obstacle to the realization of important objectives embodied in other laws" and should therefore be overruled. *Patterson v. McLean Credit Union*, 491 U.S. 164 [109 S.Ct.2363, 2371, 105 L.Ed.2d 132] (1989).

Although the actual meaning of *Booth* has been the subject of considerable debate and disagreement, it is clear that the case seriously limits the admission of victim impact evidence at the penalty phase of capital cases. It is also clear that the basis of the majority's opinion is its conviction that the harm caused by a murderer may be considered in a death penalty case only insofar as the murderer directly intended to inflict that harm. But even a relatively elementary overview of the common law of homicide shows that defendants have long been held legally accountable for results well beyond their original intent. In fact, common law doctrines of felony murder, depraved heart murder, and murder committed while intent upon inflicting serious bodily injury, all presuppose such extended responsibility.

Furthermore, contrary to implications by the majority in *Booth*, as a society we hold each other responsible for results far beyond our direct intent in ordinary moral relations. In other words, the principle at stake here is not some arcane

notion of death-penalty jurisprudence. We are speaking here of concepts of responsibility which inform our common moral discourse. *Booth* ignores -- or, at least, sells short -- those concepts. Perhaps just for this reason, *Booth* has provoked both confusion and a sort of passive resistance among the lower courts.

As such, *Booth* is an aberration in the law, running against the grain of both the common law and the common moral wisdom. Its continued vitality (questionable since the decision was announced) only serves to undermine confidence in the reasonableness of the law, by raising doubts about the consistency and impartiality of this Court's jurisprudence in the highly charged and much-watched area of death penalty litigation. Therefore, both the consistency of the law and its moral suasion would best be served by overruling *Booth v. Maryland*.

I

THE PRINCIPLES OF STARE DECISIS SHOULD NOT PREVENT THE COURT FROM OVERRULING *BOOTH V. MARYLAND*

There can be no question of the important place of the principle of stare decisis in jurisprudence. It not only has predictive value, but also assures that reasoned principle, rather than personal sympathy, shall guide the law:

> *[S]tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion."

Patterson v. McLean Credit Union, 491 U.S. 164 [109 S.Ct. 2363, 2370, 105 L.Ed.2d 132], quoting from The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton).

But "*stare decisis* is a principle of policy and not a mechanical formula . . . ." *Id.* at 109 S.Ct. 2370. To the extent that stare decisis acts to protect a coherent legal tradition or to harmonize the law with moral reasoning, it serves as a sort of guardian of consistency and predictability. But, to the extent that it acts to protect cases which are themselves at odds with that legal tradition, or which undermine sound moral reasoning, enforcement of stare decisis only erodes the values it is intended to foster.

As set forth in Section II, below, *Booth* is an anomaly in the legal tradition, departing from both common law jurisprudence and our ordinary notions of moral responsibility. Overruling it therefore will only support consistency and predictability in this area of law. It is a rare instance in which rejecting stare decisis will foster the values which adherence to precedent ordinarily protects: "public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). This case presents one of those instances.

A

Stare Decisis Is Least Persuasive In Constitutional Cases, Such As The Case At Bar

Stare decisis is least powerful in constitutional cases, where, barring a constitutional amendment, this Court has final responsibility. When this Court rules a practice unconstitutional, the effect of such a ruling is to declare that "the Constitution puts [the issue] beyond the reach of the democratic process." *Webster v. Reproductive Health Services*,

492 U.S. 490, 106 L.Ed.2d 410, 437-438 (1989). In light of this great consequence, the Court "ha[s] not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.'" *Id.*, at 106 L.Ed.2d 435.

As Justice Powell stated,

> [Stare decisis] has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation. . . . It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand. . . . [A] constitutional decision of this Court should be "always open to discussion when it is supposed to have been founded in error, [so] that [our] judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-628 (1974) (Powell, J., concurring) [footnote omitted], quoting from Passenger Cases, 7 How 283, 470, 12 L.Ed 702 (1849) (Taney, C.J.)

Booth v. Maryland should be subject to special scrutiny because it intrudes into two areas with which the courts, on Constitutional grounds, have long been hesitant to interfere. First, the effect of *Booth* is to remove a whole class of evidence from consideration by the jury. At the same time that *Booth* prescribes that the "jury is required to focus on the defendant as a 'uniquely individual human bein[g],'" *Booth*, at 504, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976),

it prevents the jury from hearing evidence of the harm done to the victim and the victim's family, as "uniquely individual human beings."[1] As such, it skews the evidence presented to the jury by reducing the victim to an abstraction. If the right to a jury trial is truly "fundamental to our system of justice," *Duncan v. Louisiana*, 391 U.S. 145 (1968), surely that presupposes a fundamental trust in the jury to weigh both sides, fairly presented. While there are certainly appropriate circumstances for limitations on prejudicial or irrelevant evidence, the Court should be particularly reluctant to censor the evidence so that "one side [is] muted." *Booth*, at 519 (Scalia, J., dissenting). Likewise, the Court should be particularly open to reconsidering a decision which has erroneously limited such a fundamental right of both sides.

Second, decisions regarding the appropriate considerations to be taken into account in sentencing are "peculiarly questions of legislative policy." *Gregg v. Georgia*, 428 U.S. 153, 176 (1976). As Justice White urged in his dissent in *Booth*, "the Court should recognize that '"[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."'" *Booth v. Maryland*, 482 U.S. at 515, quoting *Gregg v. Georgia*, 428 U.S. at 175 [quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)].

Finally, *Booth's* foundation in the Eighth Amendment is questionable at best. That the admission of evidence such as *Booth* forbids finds no prohibition in the historical bases of the "Cruel and Unusual Punishments" clause need not be belabored.

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1. It should be noted that the majority in *Booth* never offers appropriate authority for the proposition that the jury's attention should focus *entirely* on the defendant. Certainly neither of the cases cited by the majority in that portion of the opinion – *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), nor *Woodson v. North Carolina* – stand for that proposition.

Nor is that fact alone offered, in any sense, as a reason that *Booth* is incorrectly decided. As the Court correctly observed in *Furman v. Georgia*, 408 U.S. 238, 265:

> Had this "historical" interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights.

It does not follow from this, however, that the members of this Court are therefore free to discover in that Clause their own personal moral convictions, no matter how profoundly held. Such an approach would just as effectively "read into the Bill of Rights" the sort of "arbitrary discretion" which works to undermine judicial authority. As the Court also emphasized in *Furman v. Georgia*:

> We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked.

Id. at 267-268, quoting *Weems v. United States*, 217 U.S. 349, 378 (1910); emphasis added.

But if legal duty rather than personal conscience is at issue in discovering the contemporary meaning of the Constitutional prohibition against "cruel and unusual punishments" then the place to look for that duty ought to be in contemporary moral and legal values, as established and tested in the common law tradition. Yet, it is precisely upon these grounds that *Booth* most obviously founders. Certainly, *Booth* can find little

support in contemporary concerns in this area of law. The vast majority of states, as well as the federal government, have adopted victim's rights legislation, providing for the consideration of the impact of crime upon victims at the time of sentencing.[2] As a recent law review comment noted:

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2. See, Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242; Alaska Stat. § 12.55.022 (Supp. 1988); Ariz. Rev. Stat. Ann. §§ 12-253(4), 13-702(D)(9) (Supp. 1987); Cal. Penal Code §§ 1191.1 & 1203(h) (Supp. 1988); Col. Rev. Stat. § 16-11-102 (1986); Conn. Gen. Stat. Ann. § 54-91 (1985); Del. Code Ann. Title 11 §§ 4331(d) & (e) (1987); Fla. Stat. Ann. § 921.143 (1985); O.C.G.A. §§ 17-10-1.1, 1.2 (1985); Id. Code § 19-5306 (1985); Il. Stat. Ann. §§ 38-1406, 1005-4-1(6) (Supp. 1988); Ind. Code Ann. §§ 35-38-2-8 & 9 (1985 & Supp. 1988); Iowa Code Ann. § 901.3 (Supp. 1988); Kan. Stat. Ann. § 21-4604(2) (Supp. 1987); Ky. Rev. Stat. §§ 421.500(5)(b), 421.520 (1985); La. Rev. Stat. § 46:1844(9) (Supp. 1986); Me. Rev. Stat. Ann. Title 17-A § 1257 (Supp. 1988); Md. Code Ann. art. 41 § 4-609 (1987); Mass. Ann. Laws ch. 279 § 4B (Supp. 1988); Mich. Stat. Ann. § 28.1287 (763) (764) (765); Minn. Stat. Ann. §§ 609.115, 611A.037 (Supp. 1988); Ms. Code §§ 99-19-151 to 161 (Supp. 1988); Mo. Rev. Stat. § 595.203 (1986); Mont. Code Ann. § 46-18-112 (1987); Neb. Rev. Stat. § 29-2261 (1985); Nev. Rev. Stat. § 176.145 (1987); N.J. Stat. Ann. § 2C:44-6.b (Supp. 1988); N.M. Stat. Ann. § 31-24-5 (1987); N.Y. Crim. Proc. Law § 390.30(3b) (Supp. 1988); N.C. Gen. Stat. §§ 15A-825, 15A-1340.4 (1987); N.D. Cent. Code ch. 12.1-34-02 14 (Supp. 1987); Ohio Rev. Code Ann. § 2947.051 (Supp. 1985); Okla. Stat. Ann. Title 22 § 982 (1986); Or. Rev. Stat. § 144.790(2), (4) (1983); 71 Pa. Stat. § 180-9.3 (Supp. 1987); R.I. Gen. Laws §§ 12-28-4 to 4.3 (Supp. 1986); S.C. Code Ann. § 16-3-1550 (1985); Tenn. Code Ann. §§ 40-35-207(8), 40-35-209 (Supp. 1987); Tx. Stat. Ann. §§ 56.02, 56.03 (Supp. 1988); Vt. Stat. Ann. Title 13 § 7006 (Supp. 1988); Va. Code Ann. § 19.2-299.1 (Supp. 1988); Wash. Rev. Code § 7.69.030 (Supp. 1989); W. Va. Code §§ 61-11A-2 & 3 (1984); Wis. Stat. Ann. § 950.04(2m) (Supp. 1988); Wy. Stat. §§ 7-13-303(a)(iv), 7-13-402 (e)(v) (1987).

> The prevalence of victim impact statements reveals several assumptions about the purposes of punishment. Punishing the defendant according to the degree of harm caused the victim achieves two utilitarian goals: it permits the victim and society to express their outrage at the evil the defendant has cause, and it incrementally deters the underlying criminal conduct. In addition, it is widely believed that achieving the retributive goal of inflicting a "fair" or "deserved" punishment necessitates some considerations of post-crime victim suffering.

Comment, The Significance of Victim Harm: *Booth v. Maryland* and the Philosophy of Punishment in the Supreme Court, 55 CHI. L.REV. 1303, 1304 (1988).

More generally, consideration of the harm done by the crime, both to the victim and to society, is common in sentencing. Nor is this some archaic survival from past ages. For example, in setting the standards for the United States Sentencing Commission in its drafting of the new Federal Sentencing Guidelines, Congress prescribed that the Commission shall consider, among other factors:

> The nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust . . . .

28 U.S.C. 994(c)(3).

Neither (as set forth in Section II, below) does *Booth* find support in the common law tradition generally, or the law of murder, in particular. The majority in *Booth* seems to acknowledge that its view does not reflect common practice in non-capital cases:

> While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing.

Booth, at 504.

It is certainly true that the death penalty is "a punishment different from all other sanctions." *Booth*, at 509 fn. 12, quoting *Woodson v. North Carolina*, 428 U.S. at 303-304. But that does not explain *why* consideration of victim impact evidence is appropriate in other cases, but not in the cases involving the death penalty. The problem is that the majority does not explain from legal principles or moral reason, nor set forth convincing authority, such as to justify its departure from past practice. Surely, a generalized "ambivalence" about the death penalty is not sufficient to render whole categories of evidence irrelevant.

In the absence of a reasoned explanation firmly grounded in legal or moral principle, *Booth* only serves to undermine that "public faith in the judiciary as a source of impersonal and reasoned judgments" which underlies the principle of stare decisis. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

B

Booth Has Sown Confusion And Frustration Among The Lower Courts

As the Court observed in *Patterson*, a "traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable

decision, . . . or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson v. McLean Credit Union*, 491 U.S. 164 [109 S.Ct.-2363, 2371, 105 L.Ed.2d 132].

The confusion engendered by *Booth* and its progeny is well illustrated in amicus' home state of California, where the state supreme court has interpreted *Booth* one way, then another, until finally seeming to settle on a course which obviates the obstacle of '*Booth* error' by finding it consistently harmless.

In its initial attempts at understanding *Booth*, the California Supreme Court concluded that it restricted only evidence, not argument:

> We note[] that the United States Supreme Court has held formal *evidence* on the impact of a crime on the victim's family to be inadmissible and improper, but that mere *argument*, *without instructions* on that subject, may not be prohibited by *Booth*.

People v. Siripongs, 45 Cal.3d 548, 580, 754 P.2d 1306 (1988), *cert. denied* 488 U.S. 1019 (1989) [emphasis in original; citation of *Booth* omitted]; *see also, People v. Rich*, 45 Cal.3d 1036, 1089-1090, 755 P.2d 960 (1988).

Then this Court decided *South Carolina v. Gathers*, which, of course, focussed precisely upon "mere argument" of victim impact by the prosecutor (as in *Siripongs*) and found such to be prohibited.

Going back to the drawing-board, the California Supreme Court next sought to distinguish *Booth* as little more than a gloss upon the rule disfavoring prejudicial evidence. In *People v. Carrera*, 49 Cal.3d 291, 331, 777 P.2d 121 (1989), the

California court addressed testimony by the victim's mother at the penalty phase:

> Although the United States Supreme Court in *Booth v. Maryland* [citation omitted] held evidence of a murder victim's character to be irrelevant to a capital sentencing decision and its admission error, the court did not alter the analysis for the admission of evidence generally or bar the testimony of a victim's relative where that testimony is more probative than prejudicial.

Id. at 331, fn.28.

In subsequent cases, the California Supreme Court has abandoned this interpretation of *Booth*. But after finding, in case after case, that *Booth* had been violated, the court has consistently proceeded to find that the error was harmless beyond a reasonable doubt -- thus honoring *Booth* more in the breach than in the observance. *See, People v. Anderson*, 52 Cal.3d 453, 474-475 (1990); *People v. Kelly*, 51 Cal.3d 931, 964 (1990); *People v. Stankewitz*, 51 Cal.3d 72, 112, 793 P.2d 23 (1990); *People v. Clark*, 50 Cal.3d 583, 629, 789 P.2d 127 (1990); *People v. Gordon*, 50 Cal.3d 1223, 1266-1270, 792 P.2d 251 (1990); *People v. Marshall*, 50 Cal.3d 907, 928-929, 790 P.2d 676 (1990); *People v. Lewis*, 50 Cal.3d 262, 284-285, 786 P.2d 892 (1990); *People v. Douglas*, 50 Cal.3d 468, 536-537 (1990); *People v. Burton*, 48 Cal.3d 843, 868-869 (1989), *cert. denied*, 110 S.Ct. 1502 (1990).

Similar tendencies are apparent in other states, as well. *See, e.g., State v. Fain*, Idaho S.Ct. No. 18463, 1991 W.L. 27493 (Idaho March 7, 1991) (WESTLAW, Allstates library); *State v. Pizzuto*, Idaho S.Ct. Nos. 16489, 17534, 1991 W.L. 2553 (Idaho January 15, 1991); *State v. Paz*, 118 Idaho 542, 798 P.2d 1, 15-17 (1990); *People v. Crews*, 112 Ill.2d 266, 522

N.E.2d 1167, 1177-1178 (1988); *People* v. *Jackson*, 198 Ill.App.3d 831, 556 N.E.2d 619, 633-634 (Ill.App. 1990); *People v. McDonald*, 189 Ill.App.3d 374, 545 N.E.2d 819, 825 (Ill.App. 1989).

One state court justice, noting the pattern in his own state, has denounced the "[i]ndiscriminate use of the harmless error doctrine" as a detour around the obstacle posed by *Booth*. *State v. Fain*, 1991 W.L. 27493, slip op. at p.6 (Idaho March 7, 1991) (Bistline, J., dissenting). On the other hand, the alternative -- trying to understand and apply *Booth* -- is one which has stumped more than one state court, as illustrated, not only by many of the cases cited above, but also by *State v. Huertas*, 51 Ohio St.3d, 553 N.E.2d 1058 (Ohio 1990), recently before this Court. *See, Ohio v. Huertas*, 111 S.Ct. 805, 112 L.Ed.2d 837 (1991), *cert. dismissed as improvidently granted*. Finally, if the lower court concludes that *Booth is* applicable, its judges are left in a position they may find the most objectionable of all: reversing a capital case because the trial court allowed the victim to become something more than an abstraction to the jury, in violation of *Booth*. As set forth below, neither their legal backgrounds nor their common moral assumptions incline judges to embrace such a doctrine.

II

BOOTH V. MARYLAND WAS IMPROVIDENTLY DECIDED AND SHOULD BE OVERRULED

A

The Common Law Has Always Considered Actual Harm Rather Than Basing Punishment Solely Upon The Defendant's Intent

The Court in *Booth v. Maryland* determined that victim impact evidence is unconstitutionally inadmissible during the penalty phase of a capital proceeding because the information contained therein has nothing to do with the defendant's culpability. Citing to its decision in *Enmund v. Florida*, 458 U.S. 782, 801 (1982), the majority in *Booth* underlined its position that only that information which bore directly upon the defendant's "personal responsibility and moral guilt" would be admissible at a capital sentencing proceeding. *Booth*, 482 U.S. at 502. The *Booth* court concluded that victim impact statements presented factors which "may be wholly unrelated to the blameworthiness of a particular defendant." *Id.* at. 504.

While the Court in *Booth* hinted that the criminal law may well be willing to consider as relevant the actual foreseeable harm caused by the defendant in "other criminal and civil contexts," it was not willing to "agree that it is relevant in the unique circumstance of a capital sentencing hearing." *Id.* at 504. Although conceding that the Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987), made capital defendants morally culpable for more than just the harm they specifically intended, it appears the *Booth* Court nevertheless was unwilling to abandon the notion that criminal responsibility should largely remain uninformed by the harm caused. *Booth* at 504.

As one law review author has expressed:

> [T]he most serious flaw in the *Booth* Court's reasoning is its failure to recognize the *eligibility* for the death penalty always depends upon the harm that results . . . . [T]he criminal law categorizes punishments according to actual results. Thus, to reject the degree of harm inflicted as irrelevant, when divorced from the defendant's intentions, is to reject a principle that pervades the criminal justice system.

Comment, The Significance of Victim Harm: *Booth v. Maryland* and the Philosophy of Punishment in the Supreme Court, 55 U. CHI. L. REV. 1301, 1325-26 (1988).

As Justice White emphasized in his dissent in *Booth*, this Court has in other cases "indicate[d] that the harm caused by an offense may be the basis for punishment even if the offender lacked the specific intent to commit the harm. See, e.g., *United States* v. *Feola*, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed 2d 541 (1975) . . . ." *Booth* at 517 n.1. Indeed, the majority in *Booth* recognized that the harm caused to society "may be relevant in other criminal contexts" but not in "the unique circumstance of a capital sentencing hearing." *Booth* at 504. The *Booth* decision appears to make no principled distinction between capital and non-capital cases in the admission of evidence as to the impact of the defendant's actions upon society. While every human life is important and we will punish any one who takes any life unjustifiably, obviously there is a greater impact upon society when a President is killed than when the average citizen is killed. See *Booth* at 517 n.2 (*White, J.*, dissenting).

The criminal law has always incorporated within its theory of moral culpability the concept that a defendant may be held accountable not only for the intention of his act alone but also

for the harm he has caused. No where is this more evident than in the common law concepts of murder.

Classically, murder involved but one factual scenario - an individual intended to kill his victim and accomplished that end. Soon, however, English jurists recognized that life could be taken by another in circumstances in which the defendant did not intend to kill but in which his actions were so inherently dangerous to human life, that it was perceived to be unconscionable to fail to hold the defendant responsible for the harm caused to the victim. Consequently, the English jurists developed three new forms of murder in which malice would be implied from the defendant's conduct, and the defendant would be held accountable for the harm he caused to the victim even though he had never specifically intended the death of that victim. Felony murder, depraved heart murder, and intent-to-do-serious-bodily-injury short of death became new theories of murder. See W.R. LaFave & A. Scott, Criminal Law §§ 7.1, 7.3-7.5 (2d ed. 1986).

With intent-to-do-serious-bodily-injury murder a person would be guilty of murder if the death resulted from an act intended to cause great bodily injury. The unintended killing was determined to be sufficiently within the scope of the risk intentionally created by the defendant so as to make him liable for murder even though he had not intended that result. This type of commonlaw murder became a part of the law of murder in America. *Id.* § 7.3, at p. 616. Just as this form of murder makes a defendant legally culpable for the death of another even when it was not intended, so it is entirely appropriate to hold a defendant accountable for the foreseeable but unintended impact of his murder upon the victim's family and upon the community as a whole.

Similarly, the depraved heart form of murder holds a defendant accountable for the killing done with a wanton

disregard for the strong likelihood that death or great bodily injury will result from the defendant's conduct although the killing of the victim was not specifically intended by the defendant. Here, again, the defendant is held morally culpable for the result of his conduct and the harm he has caused the victim regardless of the intention of his act. *Id.* § 7.4, at pp. 617-621.

The Court in *Tison v. Arizona*, 481 U.S. 137, recognized that one who acts with a reckless disregard for human life represents a highly culpable mental state that may support a capital sentencing judgment in combination with major participation in the felony resulting death. *Id.* at 157. Although petitioners in *Tison* argued that since they did not themselves intend to kill the hapless family which had stopped by the wayside to assist petitioners, and should not be held accountable for the victims' deaths, this Court ruled that even though a murder was not specifically intended by the defendants, a reckless disregard for human life which resulted in the death of the victim could be the basis for the death penalty even though the "lethal result" was not an "inevitable" result of the conduct. *Id.* at 158. Clearly this Court in *Tison* recognized that defendants should be criminally liable for the harm they caused.

Felony murder at early common law held a felon morally culpable for an unintended death which occurred during the commission or attempted commission of a felony. While the felony murder doctrine has been refined and limited in many American jurisdictions, "the felony-murder doctrine is well entrenched in American law." W.R. LaFave & A. Scott, Criminal Law § 7.5, p. 640 (2d ed. 1986). Under this doctrine one committed a felony at one's own risk and with the understanding that one would be criminally liable for all deaths caused by one's commission of the felony. The theory of punishment underlying the felony murder rule was that it would serve as a deterrent to the commission of felonies or at

least the commission of felonies in violent ways. The felon was acting with the risk that a death might occur which he did not intend but for which he would be held strictly accountable.

The common law through the crime of attempt has long recognized that intent alone is not enough to create criminal liability and that the result of the criminal enterprise is determinative of proper punishment. The criminal law has always recognized that one who attempts to commit murder but fails to accomplish that end will be punished, but never to the extent of one who succeeds. While both the murderer and the attempt murderer have the same intent, the criminal law gives the greatest sanction to the defendant who causes the greatest harm. "If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater." *Booth v. Maryland*, 482 U.S. 496 (Scalia, J., dissenting). "The only distinction is the harm to the community which results from the defendant's actions, and this distinction is deemed sufficient to support a difference in punishment between a sentence of years and the ultimate penalty." *South Carolina v. Gathers*, 109 S.Ct. 2207, 2215 (1989) (O'Connor, J., dissenting).

The doctrine of legal impossibility also demonstrates how the intent of the actor alone is not enough to create criminal liability. This doctrine holds that one is not guilty of an attempt to a crime if the actual result intended is not proscribed by the criminal law. "'[A]n immoral motive to inflict some injury on one's fellows coupled with a misapprehension about the content of the criminal law are not good reasons for conviction.'" W.R. LaFave & A. Scott, Criminal Law, § 6.3, p. 514 (2d ed. 1986). Again, through the doctrine of legal impossibility, the criminal law affirms the premise that it is the

harm of the criminal endeavor that matters, not just the intent to cause the harm.

The criminal law as enforced throughout the United States is replete with examples where the punishment assessed the criminal is directly dependent upon the harm caused and not the moral culpability of the defendant. As a member of this court has observed, a motorist who runs a stoplight and kills someone will receive far greater punishment than a motorist who merely runs a red light without injury. The two motorists share the same moral culpability but not the same punishment merely because the harm caused by the former far exceeds the harm caused society by the actions of the latter. *Booth v. Maryland*, 482 U.S. at 517 (White, J., dissenting). Likewise, in California, one man may shoot a gun into the air to celebrate New Year's Eve and be in violation of a statute which punishes such dangerous conduct, but if the bullet he has discharged into the air returns to earth and kills a young child, he may be held accountable for criminally negligent homicide although his intent was but to celebrate New Year's Eve, albeit in a dangerous mode. The gun shooter is such a circumstance is being directly punished for the harm he has caused and not the intent of his actions. California Penal Code section 246.3.

Thus, *Booth* divorces capital offenses from the consistent notion running through the common law that a defendant's criminal liability is measured to a large extent by the result of his conduct. Indeed, "[t]he goal of truly 'individualized' punishment . . . should allow the State to include as a capital sentencing consideration the particularized harm caused by an individual murder." Note, *Booth v. Maryland* -- Death Knell For the Victim Impact Statement, 47 MD.L.REV. 701, 713 (1988).

B

Common Principles Of Morality Dictate That The Amount Of Harm Done Does Bear On The Extent Of One's Personal Responsibility

To argue that one's responsibility for one's acts should be limited only to the intention of the act alone and remain uninformed by the harm caused is to divorce the criminal law from the common principles of morality operative in our society. It is to disregard the inestimable circumstances of every day life where one is held liable for the harm caused by one's actions. For example, if two boys go to play catch on a neighbor's property, where they know they are forbidden to play because of nearby windows, they may be concerned about being caught. But the concern of both the boys and their elders will be suddenly transformed if a negligently thrown ball smashes one of those windows. The fact of the ball going through the window, although quite unintentional, transforms the situation. Even relatively young children in such a circumstance would recognize in a flash that they bear responsibility for that broken window, although they did not intend to break it. The situation becomes that much more a cause for concern if the ball not only breaks the window but beans the neighbor inside the house. And if the neighbor happens to be a little old lady with brittle bones, the situation has the potential for tragedy -- for the boys, as well as for the old lady.

Yet, in all four scenarios, the youngsters intent was the same -- intentionally to play catch in a place they were not supposed to. But their degree of responsibility is very much dependent upon the degree of harm done, though not because that harm was intended. Indeed, one of the greatest principles we attempt to impart to our children is that they must accept the consequences of their behavior, and this often includes

suffering sanctions for the unintended results of both negligent and miscreant acts.

The point of this rather homey example is not to minimize the weighty issues presented by *Booth*. Still less is it to suggest that intention is irrelevant to personal responsibility. It is not. The point is rather to emphasize how singularly inadequate is the moral world, as it is conceived of in Booth, compared to flesh-and-blood reality. We are concerned in the case at bar with basic notions of legal and moral responsibility -- notions which *Booth* simply fails to capture. By contrast, the richness of our settled traditions of the common law and our ordinary moral discourse partake of profound and incisive wisdom. We cut ourselves off from their lessons at our peril.

CONCLUSION

Booth v. Maryland was incorrectly decided. It is unsupported by prior constitutional jurisprudence. It is consistent neither with common law tradition nor with the moral underpinnings of our society. Its continued viability serves only to confuse and undermine the legitimate goals of the law. For the reasons set forth above, *Booth* should be overruled.

Respectfully submitted on behalf of the
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